APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 90-CA-0933

VALLEY FORGE INSURANCE COMPANY/CNA INSURANCE COMPANY

v.

DARLENE STRICKLAND, mother and next friend of TINA STRICKLAND, and DARLENE STRICKLAND, individually,

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May 13, 1993

Rehearing Denied July 22, 1993

Dorrance Aultman, Aultman Tyner McNeese & Ruffin, Hattiesburg, Theodore A. Boundas, Robert L. Suomala, Peterson & Ross, Chicago, IL, for appellant.

T. Patrick Welch, McComb, Jim Kitchens, Connie Johnson, Kitchens & Ellis, Jackson, T. Patrick Welch, McComb, for appellee.

Before DAN M. LEE, P.J., and SULLIVAN and BANKS, JJ.

DAN M. LEE, Presiding Justice, for the Court:

This case originated when Valley Forge filed a complaint seeking a declaration that it was entitled to the proceeds ($25,000) under an insurance contract between

Nationwide Insurance and Vergie Aull. Valley Forge based its claim on the subrogation rights afforded by Mississippi Code Annotated §§ 83-11-103 and 83-11-107. By way of counterclaim, Darlene Strickland sought, on behalf of her daughter, the $25,000 payment representing the limit of Aull's automobile liability policy with Nationwide. She also asserted a claim for a second payment of the policy limits of her insurance binder with Valley Forge because the first payment to her minor daughter was not court approved. Strickland additionally alleged tortious interference with settlement negotiations on the part of Valley Forge and "bad faith."

The chancellor ruled that Strickland was entitled to the $25,000 benefit under the Nationwide policy. He further ruled that Valley Forge must again tender its policy limits of $55,000 due to its failure to obtain court approval. Finally, he found against Valley Forge on the bad faith claim and unconditionally awarded the Stricklands $1,000,000 in punitive damages. The judgment also called for an additional $1,000,000 award payable only if Valley Forge failed to satisfy certain corrective and preventive measures described in the judgment and discussed below.

Valley Forge properly appealed the adverse ruling below, asserting the following as assignments of error:

I. The Chancery Court erred in refusing to apply Louisiana law to the counterclaim for punitive damages.

II. The Chancery Court erred in holding that Valley Forge acted in bad faith and in imposing punitive damages.

III. The Chancery Court awarded excessive punitive damages.

IV. The Chancery Court erred in awarding conditional punitive damages.

V. The punitive damages award against Valley Forge violated the Fourteenth Amendment to the United States Constitution and the Mississippi Constitution.

VI. The Chancery Court erred in denying Valley Forge a jury trial on the counterclaim for bad faith.

VII. The Chancery Court erred in the calculation of damages, attorney's fees, and interest.

STATEMENT OF THE FACTS

On June 9, 1987, Darlene Strickland, a resident of Tangipahoa Parish, Louisiana, applied for an automobile liability policy from Valley Forge. The parties agreed to a temporary binder pending further review of the application. Although no policy was ever issued, the binder was in effect on July 23, 1987, the date of the automobile accident that ultimately gave rise to this suit. The binder provided for uninsured motorist coverage of $50,000 and medical payments coverage of $5,000.

On the day of the accident, Strickland's twelve year old daughter, Tina, was a passenger in an automobile being driven in Jackson County, Mississippi, by her father's sister, Vergie Aull, a Mississippi resident. As a result of a collision with a van, Tina suffered severe injuries, including brain damage. These injuries initially required a lengthy hospital stay and costly rehabilitation. Tina will continue to require extensive medical care.

During the early stages of Tina's recovery in a Mississippi hospital, her parents hired Robert Carter, a Louisiana attorney, to pursue Tina's legal claims. Carter began corresponding with the CNA insurance group. The CNA group is a collection of independent insurance companies that are associated for certain purposes. Valley Forge is a member of the CNA group. Carter made con-

tact with Diane Nelson, a claims specialist in Valley Forge's Metairie, Louisiana, office.

After an initial investigation, Nelson requested authority to pay the policy limits, $55,000. During the investigation Nelson learned that Nationwide accepted Aull's liability and hoped to settle for the $25,000 limit on Aull's policy. She also obtained information that allowed her to estimate that Tina's damages exceeded $200,000.

After receiving approval from her supervisors, Nelson mailed a draft for $55,000 to the Stricklands, payable to the order of "Alvin Denman Strickland & Margaret Darlene Strickland, as Parents/Guardian of Tina Strickland, A Minor, and their Attorney Robert J. Carter." Included with the check was a "Receipt for Payment," a "Subrogation Receipt," and a note to Carter asking him to have his clients execute the documents prior to the release of the funds. The Stricklands executed the documents and received the balance after Carter deducted a fee of $12,146. No court ever approved the settlement or supervised the disbursement of the funds.

After obtaining the $55,000 from Valley Forge, the Stricklands, through their attorney Carter, continued to seek recovery from Aull's automobile liability insurer, Nationwide. In June 1988, the Stricklands filed suit in Louisiana against Aull, her husband, the driver of the van involved in the accident, and Nationwide. During the pendency of this action, Carter was apparently terminated and the Stricklands employed their current lawyers. The Louisiana suit was not prosecuted further.

Nationwide indicated a willingness to pay the full limits of the policy held by Mrs. Aull to the Stricklands. However, Nationwide was unwilling to do so unless Valley Forge waived whatever subrogation rights it held in connection with Valley Forge's payment to the Stricklands. (Either by virtue of Mississippi statutory law or the document titled "Subrogation Receipt" which purported to

transfer to Valley Forge all of Tina's claims against third parties.) Valley Forge refused to waive, thereby creating an impasse. Eventually, Valley Forge filed a declaratory judgment action in a Mississippi court to determine the validity of its subrogation claim. The original plaintiff was CNA but Valley Forge was later substituted as the real party in interest by an agreed order. The Stricklands filed an answer denying the validity of the subrogation claim and counterclaim alleging that the $55,000 payment was a nullity for lack of court approval and further alleging tortious interference and "bad faith" on the part of Valley Forge.

SUMMARY OF THE CHANCELLOR'S JUDGMENT

The significant portions of the lower court's judgment and opinion are summarized below, largely in the chancellor's own words.

1. Is Valley Forge entitled to subrogation or offset?

No. Under Louisiana law and their own policy provisions, Valley Forge is not entitled to subrogation or offset. Tina is entitled to the $25,000.

2. Has there been a valid settlement of Tina's claim under Louisiana law?

No. Since no court approval was obtained for the $55,000 payment by Valley Forge, there has been no settlement, the subrogation agreement is void, and Tina is entitled to receive a court-approved settlement of $55,000 from Valley Forge.

3. Is Valley Forge liable to Tina for interest on the Nationwide $25,000?

Yes. Valley Forge is liable for interest at 8% per annum from November 29, 1988 (the date the court found that payment was offered) until the date such sum was (or is) paid.

4. Is Tina entitled to recover punitive damages from Valley Forge?

Yes. Valley Forge by filing this suit, as well as by refusing to acknowledge it had no subrogation rights, wrongfully interfered with Tina's recovery of the $25,000. The chancellor awarded the Stricklands $1,000,000 unconditionally and another $1,000,000 should Valley Forge fail to comply with certain corrective requirements set out at length in the chancellor's opinion.

I. The Chancery Court erred in refusing to apply Louisiana law to the counterclaim for punitive damages.

The chancellor applied Mississippi law to the counterclaim, relying on the public policy exception to our normal "most significant relationship" choice of law rule. The protection of minors was the policy concern that was purportedly offended by application of Louisiana law. Valley Forge disputes the applicability of the public policy exception, and asserts that Louisiana law should apply to the counterclaim. Apparently Louisiana law would not provide for punitive damages in this case.

After careful consideration of the record, we conclude that there was no requirement that the lower court choose between Mississippi and Louisiana law for purposes of assessing punitive damages. The law applicable to the underlying tort is also applicable on the issue of punitive damages. *Restatement (Second) of Conflicts of Law § 171.* The chancellor based his award of punitive damages on Valley Forge's assertions of subrogation rights and its failure to obtain court approval of the original settlement payment. We are of the opinion that only the assertion of the subrogation right rises to the level of tortious conduct. While the failure to obtain court approval of the initial payment was an oversight, requiring a second, court supervised payment, it cannot be said to have been in callous disregard to the rights of another. Con-

sequently, it cannot support an award of punitive damages.

As for the assertion of subrogation rights under Mississippi statutory law, the chancellor correctly found that this conduct occurred in Mississippi. As he stated in his opinion:

> Valley Forge considered Tina's claim worth more than $205,000. Valley Forge knew, or should have known, that the subrogation agreement signed for Valley Forge by the Stricklands was void, or at least subordinate to Tina's being made whole. Valley Forge knew Louisiana law did not permit subrogation or offset until after the insured is made whole. Valley Forge knew it did not obtain court approval of the settlement of Tina's claim. Valley Forge knew Tina was seeking recovery of the $25,000 from Aull-Nationwide, and $10,000 from Cromwell-Automotive. Armed with all this information, Valley Forge's subrogation/offset contention is without merit and frivolous. Armed with such information, *Valley Forge has engaged in a bad faith effort to assert in Mississippi a contention Valley Forge knows it cannot successfully assert in Louisiana, the state where the contract was made.*

(emphasis added).

We will address whether this conduct warrants punitive damages below. For now it is important to note that the only tortious conduct to be found in the record occurred in Mississippi. It follows, *a fortiori*, that the only law to consider in assessing punitive damages is Mississippi law. The conflict of punitive damages law perceived by the chancellor was a false one. However, he cured his mistake by torturing the choice of law rules to yield the same result. Where a lower court reaches the proper result, albeit through no fault of its own, we will not reverse. *See Monroe County Bd. of Educ. v.*

Rye, 521 So.2d 900 (Miss. 1988). Thus, this assignment of error is without merit.

II. The Chancery Court erred in holding that Valley Forge acted in bad faith and in imposing punitive damages.

The chancellor held that Valley Forge's assertion of a subrogation right in Mississippi was an act of "bad faith" that wrongfully interfered with Tina's settlement negotiations with Nationwide. On appeal, Valley Forge asserts that its actions were justifiable and that Nationwide was merely seeking an excuse to withhold payment. Valley Forge argues that it never considered subrogation until Nationwide demanded a waiver of such claims. Then, on the advice of outside counsel, Valley Forge came to believe that a Mississippi court might apply this State's statute allowing subrogation even though that statute is at odds with both Louisiana law and the provisions of the policy that would have issued to the Stricklands. Valley Forge cites a case wherein this Court refused to allow a claim under the Louisiana Direct Action statute because to do so would conflict with Mississippi public policy. *See McNeal v. Administrator of Estate of McNeal*, 254 So.2d 521, 524 (Miss. 1971).

According to Valley Forge, the declaratory judgment action was filed to settle this "question" of Mississippi law, in order to expedite payment to the proper party and not to hold up or interfere with Tina's recovery. Valley Forge relies on *Employers' Mutual Casualty Co. v. Tompkins*, 490 So.2d 897 (Miss. 1986) where this Court held that filing a complaint to resolve a legal issue is not to be considered bad faith merely because the issue is ultimately resolved against the insurer.

The same conduct may give rise to an action for breach of contract as well as an action in tort. Under the facts of this case, any action for breach, including

punitive damages for bad faith breach, would of course be subject to Louisiana contract law. However, if Valley Forge's actions in Mississippi also constitute an intentional tort of negligence, then Mississippi tort law, including the rules related to punitive damages would control. Beyond this choice of law issue, however, the distinction between tort and contract actions is largely academic. Either may provide a basis for imposition of punitive damages under proper circumstances. The chancellor in his written opinion labelled Valley Forge's conduct a "bad faith effort" to assert a meritless contention in the courts of Mississippi, implying a breach of the implied contractual covenant of good faith and fair dealing. We consider it to more properly involve gross negligence in filing and maintaining a groundless lawsuit, to the detriment of the Tina Strickland.

The standard for punitive damages is the same under either approach. "A plaintiff is entitled to punitive damages only if he has demonstrated a willful or malicious wrong or the gross, reckless disregard for the rights of others." *Strickland v. Rossini,* 589 So.2d 1268 (Miss. 1991).

On the facts of this case, we have no difficulty concluding that Valley Forge acted negligently. By virtue of its relationship with Tina Strickland, it owed her a duty not to interfere with her recovery of amounts due to her. This duty transcends the contract between Valley Forge and Darlene Strickland. Valley Forge breached this duty by asserting a meritless subrogation claim. As a result Tina lost the use of desperately needed funds, unquestionably suffering serious damages. As for punitive damages we agree that the conduct demonstrated a callous and reckless disregard for the rights of Tina Strickland. To borrow an analogous concept from contract cases, Valley Forge had no "arguable basis" for its position. The claim that a Mississippi court would apply Mississippi statutory law is patently untenable,

given the policy provisions. Even a Mississippi insurance contract could contain effective clauses subordinating an insurer's subrogation claim to the insured's interest in full recovery, statutory offset rights notwithstanding.

Thus although not technically "bad faith" as that term is used in breach of contract cases, Valley Forge's conduct was sufficiently egregious to justify punitive damages. Accordingly, this assignment of error is without merit.

III. The Chancery Court awarded excessive punitive damages.

The chancellor awarded $1,000,000 in punitive damages unconditionally based on Valley Forge's assertion of subrogation rights and another contingent $1,000,000 based on the failure to obtain court approval for the Louisiana settlement. We affirm the unconditional award under this heading and address the contingent award below.

Valley Forge's argument on this issue consists of two assertions that punitive damages in any amount are improper. First the company denies any malice or recklessness. According to Valley Forge, the Stricklands' insurance claim was handled promptly and fairly, with coverage acknowledged and limits paid one month after notification of the claim. Thus, in Valley Forge's estimation, there was no evidence on an intent to cause harm.

Next Valley Forge denied any actual damage and cited precedent to the effect that, "an award of punitive damages must be supported by the existence of actual damages." *See Defenbaugh and Co. v. Rogers*, 543 So.2d 1164, 1167 (Miss. 1989). The company claims that Tina suffered no actual harm as a result of its conduct. According to Valley Forge, the Chancery Court did not articulate how, and in what amount, Tina had been actually harmed.

No hard and fast rule exists for establishing the maximum amount of punitive damages awardable in any given case. *Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172 (Miss. 1990); *Bankers Life and Cas. Co. v. Crenshaw,* 483 So.2d 254 (Miss. 1985). Instead, the amount must be considered in light of several factors. First, the amount awarded should serve to punish the insurer and to deter it from committing similar offenses in the future. Second, the amount should serve as an example set to deter others from committing similar offenses. Third the amount awarded should account for the insurer's pecuniary ability and financial worth. And fourth, the amount constitutes compensation for the plaintiff for his or her "public service" in bringing the action. *Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172 (Miss. 1990).

On appeal, an award will be disturbed only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court. *Williams,* 566 So.2d at 1190; *Crenshaw,* 483 So.2d at 278.

The $1,000,000 amount awarded unconditionally below is not shocking to the conscience of the Court. In fact the 1.5% of net worth awarded here is proportionately lower than in other similar cases. *See e.g., Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172 (Miss. 1990) (5¼ per cent of net worth affirmed). Given the egregiousness of Valley Forge's conduct in holding up Tina's recovery for her injuries, as well as the serious actual damages suffered, it cannot be said that this award was so excessive as to evidence passion, bias, or prejudice on the part of the chancellor. Accordingly, this assignment of error is without merit.

IV. The Chancery Court erred in awarding improper relief.

Valley Forge argues that the non-monetary relief granted by the chancellor violates important legal prin-

ciples by going beyond what is necessary to decide the pending case and by disregarding the cautious approach to punitive damages advocated by this Court.

There are two rules applicable to this issue. First, chancellors have only those remedial powers necessary to a particular case:

> The remedial powers of our chancellors are sufficient to vindicate the claims and interests of all litigants. Those powers are as broad as equity and justice require. Those powers have always been marked by flexibility and expansiveness so that appropriate remedies may be decreed to satisfy the needs of the particular case. The chancellor's remedial powers are marked by plasticity. Equity jurisdiction permits innovation that justice may be done. That there is no precedent for the exact relief sought is of no consequence.
>
> Courts of equity have all remedial powers *necessary to the particular case*, except those that are expressly forbidden by law.

Hall v. Wood, 443 So.2d 834, 842-43 (Miss 1983) (emphasis added).

The second general rule is that punitive damages in Chancery Court are not favored and are to be allowed only with caution and within narrow limits. *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454 (Miss. 1983) (footnote 1); *Standard Life Ins. Co. of Indiana v. Veal*, 354 So.2d 239 (Miss. 1977).

Obviously the corrective measures fashioned by the chancellor were not intended to be of any direct benefit to the plaintiff in this case. Although his intentions were laudable, matters of such general and far reaching import are better left to the legislative branch. Courts have only the more narrow duty to interpret the law. Furthermore, we do not consider the conduct related to the set-

tlement in Louisiana sufficiently culpable to justify punitive damages. For the foregoing reasons, we reverse the award of the second million dollars as well as the alternative affirmative measures.

V. The punitive damages award against Valley Forge violated the Fourteenth Amendment to the United States Constitution and the Mississippi Constitution.

This issue was definitively resolved by this Court in *Ivy v. General Motors Acceptance Corporation*, 612 So.2d 1108 (1992) ("In sum, this Court rejects GMAC's contention that Mississippi's system for awarding punitive damages is unconstitutional.") Under the ruling in *Ivy*, this assignment of error is without merit.

VI. The Chancery Court erred in denying Valley Forge a jury trial on the counterclaim for bad faith.

Valley Forge filed its declaratory judgment action in the Chancery Court of Jackson County. After the Stricklands filed their counterclaim seeking punitive damages, Valley Forge filed a motion requesting a jury trial, or, in the alternative, a transfer to Circuit Court. The judge denied both these motions and proceeded to trial.

This assignment of error calls upon the Court to revisit the conflict between Article 3, Section 31 and Article 6, Section 147 of the Mississippi Constitution. These sections provide, in relevant part:

> The right of trial by jury shall remain inviolate, ...

Article 3, Section 31.

> No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment and decree, from any error or

> mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction. . . .

Article 6, Section 147.

This Court unquestionably extended the power to impose punitive damages to Chancery courts in *Tideway, supra*. We did so with full knowledge of our prior decisions holding that a chancellor's failure to provide a jury trial is not grounds for reversal. *See e.g. Louisville & Nashville R.R. Co. v. Hasty,* 360 So.2d 925, 926 (Miss. 1978). Indeed, in *Tillotson v. Anders,* 551 So.2d 212 (Miss. 1989), the majority stated, "Section 31 [constitutional right to jury trial] is of no effect in chancery." (footnote 2). Thus, this assignment of error is without merit. In a proper case this Court may someday reconsider the holding in *Tillotson,* but we see no reason to grapple with the issue in a case where the complaining party chose the Chancery court as the forum.

VII. The Chancery Court erred in the calculation of damages, attorney's fees, and interest.

Finally, Valley Forge challenges the lower court rulings on the $55,000 second payment, the $30,000 in attorneys' fees, and the interest on the $25,000 payment ordered from Nationwide to Tina.

First, Valley Forge argues that even if the first payment it made to the Stricklands was not an effective settlement of Tina's claim, payment of the full amount a second time would only be appropriate if there were evidence that the funds were improperly used. The insurer cites *Succession of Emonot,* 109 La. 359, 33 So. 368 (1902), for the proposition that if a tutor accepts payment in settlement of a claim belonging to a minor without court approval, the tutor becomes liable to the minor only for the *difference between the amount received by the minor* and the total amount which the court finds should have been received. However, the tutor's liability

for mishandling monies is not at issue in this case. Under applicable Louisiana law, a compromise of a minor's claim without court approval is a nullity. *See Guidry v. Bowers,* 458 So.2d 933 (La. App. 1st Cir. 1984). Therefore, under strict application of Louisiana law, Tina never received anything. Thus, Valley Forge must pay the full limit again. Accordingly, the $55,000 award was apparently proper.

Next, Valley Forge challenges the award of attorney "fees and expenses" and prejudgment interest at the legal rate on the $25,000 payment from Nationwide. Attorney fees may be awarded in cases where punitive damages are proper, regardless of the existence of contingent fee arrangements. Likewise, in the absence of statutory authority, prejudgment interest is also allowable in cases where punitive damages are justified. *See Stanton & Associates v. Bryant Const. Co.,* 464 So.2d 499, 502 (Miss. 1985). As discussed above, punitive damages were proper in this case and consequently the award of attorney fees and interest was not error.

CONCLUSION

For the foregoing reasons, the judgment of the lower court is affirmed in all respects except for the second million dollars of punitive damages and the alternative affirmative measures, which are reversed and rendered.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART.

HAWKINS, C.J., PRATHER, P.J., and SULLIVAN, PITTMAN, BANKS, ROBERTS, and SMITH, JJ., concur.

McRAE, J., not participating.

APPENDIX B

IN THE CHANCERY COURT
OF JACKSON COUNTY, MISSISSIPPI

No.: 53,835

C.N.A. INSURANCE COMPANY,
Plaintiff

vs.

DARLENE STRICKLAND, MOTHER AND NEXT FRIEND OF TINA STRICKLAND, DARLENE STRICKLAND, INDIVIDUALLY, and VERGIE M. AULL,
Defendants.

JUDGMENT AND OPINION

[Filed June 26, 1990]

This cause involves Tina Strickland, a female child born April 8, 1975, who resides with her parents in Louisiana and who, while visiting her aunt, Vergie Aull, was seriously injured on July 23, 1987. Tina was injured while riding in Jackson County, Mississippi, with her aunt Vergie Aull, a Mississippi resident, in Mrs. Aull's car when a collision occurred with a vehicle driven by James Cromwell. Tina was hospitalized in Pascagoula for many weeks following the accident. Tina's injuries were enormous and will exceed $150,000.00 many times over. She suffered permanent brain damage and will be involved in therapy for years. Valley Forge, at an early date, valued Tina's claim at over $205,000.00.

While Tina was in the hospital, her parents engaged a Louisiana attorney, Robert Carter, to represent them and Tina. The attorney made demand upon the Stricklands'

insurance carrier, Valley Forge Insurance Company, a Pennsylvania corporation doing business in Louisiana and Mississippi, which had covered the Stricklands' motor vehicle in Louisiana for $55,000.00 per person ($50,000.00 being uninsured motorist coverage and $5,000.00 being medical payments coverage).

Throughout the negotiations, Valley Forge Insurance Company was represented by an agent of C.N.A. Insurance Company. C.N.A. Insurance Company is an association of several companies, but is not itself incorporated and is not a legal entity. This action was originally filed with C.N.A. as the named party plaintiff. Valley Forge Insurance Company was substituted as party plaintiff in an agreed order of this Court dated May 7, 1989, in which the Court affirmatively found that the agents and representatives of C.N.A. Insurance Company acted for and on behalf of Valley Forge Insurance Company in this matter.

Mrs. Aull had a $25,000.00 liability policy with Nationwide Insurance Company and Cromwell had a $10,000.00 liability policy with Automotive Assurance Company. Early on it was evident that Tina's damages would greatly exceed the total coverage of $90,000.00 potentially available.

Valley Forge promptly paid the policy limits, $55,000.00, on October 9, 1987, through one of its Louisiana agents to attorney Robert Carter and Tina's parents. A Subrogation Receipt and Receipt for Payment were forwarded to Mr. Carter with the draft, with instructions that the Stricklands execute them. No court approval was sought or obtained nor was a tutorship (guardianship) established. Prior to making payment, Valley Forge had actual knowledge of the limits of the Aull-Nationwide policy. Attorney Carter charged $12,000.00 as attorney fee and the balance of the money went for bills for Tina.

The Stricklands were not enthusiastic about the prospects of suing Tina's aunt, Mrs. Aull, although Attorney

Carter made formal demand on her insurance carrier Nationwide, and in June, 1988, suit was filed in Louisiana against Mrs. Aull, Nationwide, Cromwell and Automotive Casualty. Nationwide offered to pay Tina the $25,000.00, provided Valley Forge asserted no subrogation. When this was communicated to Valley Forge, Valley Forge refused to agree and asserted subrogation rights. Nationwide would not pay Tina in the face of Valley Forge's subrogation demand. On March 22, 1989, Valley Forge filed this Mississippi action to have this Court determine whether Valley Forge or the Stricklands were entiled to the $25,000.00 from Aull-Nationwide. Valley Forge contends it is entitled to the $25,000.00 pursuant to a subrogation agreement signed by Mr. and Mrs. Strickland, or on the basis of offset. The Stricklands and Tina's guardian *ad litem* contend:

1. Under Louisiana law and their own policy provisions, Valley Forge is not entitled to subrogation or offset.

2. Tina is entitled to the $25,000.00.

3. Since no court approval was obtained for the $55,000.00 payment by Valley Forge, there has been no settlement, the subrogation agreement is void, and Tina is entitled to receive a court-approved settlement of $55,000.00 from Valley Forge.

4. That Valley Forge has, by the filing of this suit, as well as by refusing to acknowledge it had no subrogation rights under the circumstances, wrongfully interferred with Tina recovering the $25,000.00 from Nationwide, which Nationwide is willing to pay, but wants to be sure it pays to the proper party.

5. The Stricklands assert Tina is entitled to punitive damages and attorneys fees. The Stricklands established that Valley Forge has a historic record in Louisiana and Mississippi of not requiring court approval of settlements with minors.

Valley Forge questions the jurisdiction of this Court over the claims of the minor. The Court finds and adjudicates that Valley Forge has submitted itself to the jurisdiction of this Court with regard to all claims raised in the complaint and the counterclaim, by initiating this action, and that this Court has jurisdiction over the minor's claims for the reason that the same represent assets of the minor located in this State. The minor has an unliquidated claim against a resident of this State, Vergie Aull. Moreover, the minor's claim against Valley Forge derives, at least in part, from its wrongful actions in this State.

The insurance contract between Valley Forge and the Stricklands was made in Louisiana and consistent with the teachings of *Boardman v. United States Auto Association*, 470 So2d 1024 (Miss., 1985) and related cases, is to be construed according to the laws of Louisiana to the extent appropriate.

IS VALLEY FORGE ENTITLED TO SUBROGATION OR OFFSET?

Applying Louisiana law, and the Valley Forge policy itself, this question must be answered in the negative. By the express terms of its insurance policy, Valley Forge provided that it would not be entitled to subrogation where the damages to the insured exceeded both the Valley Forge policy limits and the limits of other insurance companies.

The "Uninsured Motorists Coverage Amendment-Louisiana," which is the last page of the contract, part II, General Provisions, provides as follows:

> Paragraph A. of the Our Right To Recover Payment provision of Part F *does not apply to damages an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle"* as defined in Section 2 of the definition of "uninsured motor vehicle" under Part C. [Emphasis added.]

Referring to Paragraph A. of Part F, we find that the following provision, in pertinent part is the one described as *inapplicable*:

> A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right.

The definition of "uninsured motor vehicle" is also provided in the amendment, under Part I Paragraph B:

> Section 2. of the definition of "uninsured motor vehicle" is replaced by the following:
>
> "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
>
> 2. To which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is not enough *to pay the full amount the "insured" is legally entitled to recover as damages.* [Emphasis added.]

Tina Strickland was an insured, riding in a vehicle covered by a liability insurance policy of $25,000.00, far less than the amount of her damages, which Valley Forge admits exceeded $205,000.00. Thus, the Aull vehicle was an uninsured motor vehicle under the policy. Under the "Uninsured Motorist Coverage Amendment-Louisiana," the subrogation provision of the policy does not apply to damages the insured is entitled to recover from the owner and operator of the uninsured motor vehicle. By the express terms of its own policy, Valley Forge has *no subrogation right.*

Valley Forge argues that, under the *Boardman* doctrine, Mississippi law ought to be applied because Mississippi has expressed a strong public policy in support of the right of an uninsured motorist carrier to offset, by virtue of Section 83-11-107 of the Mississippi Code. The Court sees nothing in this statute, or in the Uninsured Motorist Act as a whole, which would jusitfy a conclusion that Mississippi has such a strong interest in pro-

tecting a right of subrogation that an insurer ought to be saved from enforcement of a provision of its own policy, which denies it subrogation until after the insured is made whole. Such a provision violates no public policy or law in Louisiana or in Mississippi, but simply represents a right favorable to the insured which properly Valley Forge could bestow and which is not repugnant to Louisiana law. Under Louisiana law, subrogation and offset are subordinate to the insured's right to be made whole.

La. Rev. Stat. R.S. 22:1406 governs the issuance of uninsured motorist coverage in that state. Paragraph (2)(b) is the following definition of "uninsured motor vehicle":

> For the purposes of this Coverage the term uninsured motor vehicle shall, subject to the terms and conditions of such coverage, also be deemed to include an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the amount of damages suffered by an insured and/or the passengers in the insured's vehicle at the time of an accident, as agreed to by the parties and their insurers or as determined by final adjudication.

In *Bond v. Commercial Union Assur. Co.*, 407 So. 2d 401 (La. 1981), the Louisiana Supreme Court discussed the limits of the subrogation right under the statute. The Court said:

> We conclude that upon payment an insurer, pursuant to a subrogation agreement contained in its policy, becomes conventionally subrogated to its insured's right against the uninsured tortfeasor.

The Court went on to hold that insurer's right of reimbursement is subordinate to the insured's claim for the balance of the damages:

> By giving the insured who has been only partially compensated for his loss a lawful cause of prefer-

> ence over the insurer for payment out of his debtor's property, the code further implements the object to the uninsured motorists statute, which is *to promote full recovery for damages by innocent automobile accident victims* by making both primary protection and excess coverage available. [Emphasis added.]

Though Valley Forge seeks to invoke Mississippi law, for the reasons stated above, it cannot. Moreover, it is clear that, under *Dunnam v. State Farm*, 366 So2d 668 (Miss. 1979), the insurer cannot compel the guardian of a minor to execute a trust agreement giving the company the first right to recover payment from the uninsured motorist.

Accordingly, Tina is entitled to the Aull-Nationwide $25,000.00.

HAS THERE BEEN A VALID SETTLEMENT OF TINA'S CLAIM UNDER LOUISIANA LAW?

The answer to this question, in Louisiana, as well as in Mississippi, is the same, but applying Louisiana law, there has been no valid settlement.

L.S.A.—C.C.P. Art. 3071. Transaction or Compromise, definition states:

> A *transaction* or *compromise* is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

L.S.A.—C.C.P. Art. 3072. Capacity of parties; authority of tutors or curators says:

> A man to transact must have the capacity to dispose of the things included in the transaction.
>
> The tutor of a minor . . . can not make a transaction without being authorized thereto by the judge.

Art. 4265 of the Louisiana Civil Code provides as follows:

> With the approval of the court as provided in Article 4271, a tutor may compromise an action or right of action by or against the minor, or extend, renew, or in any manner modify the terms of an obligation owed by or to the minor.

The tutor occupies the same position in Louisiana law that the guardian maintains in Mississippi law. However, under Louisiana law, so long as the father and mother of the child are alive, married and living together, the father occupies the position of natural tutor. Art. 4501 is, in pertinent part, as follows:

> When both parents are alive and not divorced or judicially separated, property belonging to a minor may be sold or mortgaged, *a claim of a minor may be compromised,* and any other step may be taken affecting his interest, in the same manner and by pursuing the same forms as in case of a minor represented by a tutor, the father occupying the place of and having the powers of a tutor. [Emphasis added.]

The statute was amended to include the underlined portion, and cases decided subsequent to the amendment of Art. 4501 hold that a compromise made without court approval is not binding on the minor. This is in keeping with earlier cases holding that transactions falling under the statute are void if no court approval is obtained. *Chambers v. Chambers,* 6 So. 659 (La. 1889). (A transaction or compromise has no force or effect in respect to minors, unless same is duly authorized by a judge.) In *Johnson v. Ford Motor Co.,* 707 F.2d 189 (5th Cir. 1983), the Fifth Circuit, interpreting Louisiana law, held that compromises entered into absent court approval under article 4271 are of no legal effect.

Under the Mississippi cases of *Union Chevrolet v. Arrington*, 162 Miss. 816, 138 So. 593 (Miss. 1931) and *Mississippi State Bar v. Moyo*, 525 So. 2d 1289 (1988), the settlement would be invalid even if Mississippi law were applied. Moreover, these cases express a strong public policy in this State of protecting the rights of minors in their dealings with others. In *Union Chevrolet*, Justice Griffith said:

> The court will not and cannot permit the rights of an infant to be prejudiced by any waiver, or omission or neglect or design of a guardian, or of any other person, so far as within the power of the court to prevent or correct. [Citations omitted.] *All persons who deal with* guardians or with *the Courts in respect to the rights of infants are charged with the knowledge of* [*certain*] *principles, and act to the contrary thereof at their peril.* [Emphasis added.]

Thus, our law charges all persons dealing with minors with a duty to know and follow the requirements of the law. When, as here, the insurance company elects not to do so, or fails to do so, it has acted at its peril and lost.

IS VALLEY FORGE LIABLE TO TINA FOR INTEREST ON THE NATIONWIDE $25,000.00?

Valley Forge is liable for the interest at the rate of 8% per annum from the date Nationwide was prepared and willing to pay the $25,000.00 until such sum is paid. Nationwide offered the $25,000.00 limits to Tina Strickland on November 29, 1988. By virtue of its own policy provisions, as well as Louisiana Law, Valley Forge knew it was not entitled to subrogation or offset as against Nationwide or Automotive, as discussed in the previous paragraph.

IS TINA ENTITLED TO RECOVER PUNITIVE DAMAGES FROM VALLEY FORGE?

The Stricklands cite no Louisiana authority for the allowance of punitive damages. Valley Forge asserts the reason is that there is no authority in Louisiana for punitive damages in such a case as this. The Stricklands ask the Court to apply Mississippi law to this issue. The Court notes that each side has asked this Court to apply to each of them, on the one hand, those Louisiana laws which favor their side on some issues and apply Mississippi laws which favor their side on other issues. *Boardman, supra,* teaches that the center of gravity test is applied issue by issue, not necessarily to the case as a whole. The question is, then, whether there are circumstances in this case which make it proper for the Court to apply Mississippi law to determine whether punitive damages should be considered. As *Boardman* notes ". . . no foreign state's substantive law will be enforced in courts of this state where to do so would be offensive to the deeply ingrained or strongly felt public policy of the state." Also, ". . . in deciding each new case a judgment call is necessary."

Apparently, Louisiana does not allow punitive damages. Mississippi does. It is conduct which determines the applicability of punitive damages.

Is there a substantial interest in upholding the public policy of this state which permits consideration of punitive damages in proper cases if this Court were to determine this to be a proper case? *Arrington* and *Moyo, supra,* assert a powerful public policy for protecting minors, a policy which is deeply ingrained and strongly demonstrated in the legal history of Mississippi. Our laws have persistently and forcefully thrown a protective cloak over children and our courts have been mandated to act as "superior guardians" to see that children's rights are fully and faithfully respected by all who deal with them.

Against this backdrop, Valley Forge has asserted subrogation/offset rights to receive the Aull-Nationwide $25,000.00 to the exclusion of Tina, notwithstanding Valley Forge's actual knowledge that Tina's damages greatly exceed *all* insurance coverage potentially available. Valley Forge's subrogation/offset assertion is made in the face of Valley Forge's own policy provisions and Louisiana law, both clearly to the contrary of Valley Forge's assertion. Valley Forge seeks to justify its assertion by saying it did so only because Tina was not seeking recovery of the $25,000.00 from Aull-Nationwide and that Mississippi law allowed offset. Valley Forge ignores the fact that the Stricklands' attorney in 1987 had demanded payment from Aull-Nationwide and filed suit in Louisiana in June, 1988, seeking recovery from Aull-Nationwide and Cromwell-Automotive. The facts belie Valley Forge's assertion.

This record does not demonstrate that $12,000.00 was a reasonable fee for services of Attorney Carter, but, in any event, any fee he may have been entitled to was subject to the approval of a court in Louisiana and such was not obtained, despite the clear requirements of both Louisiana and Mississippi law. If this were the only instance where Valley Forge had failed to obtain court approval of minors' settlements, one might view it as a simple mistake. But, by their own admissions, not obtaining court approval is a long-established pattern of conduct for Valley Forge, both in Louisiana and Mississippi. A Louisiana court initially should have been asked ot deal with the subrogation/offset issue, if, indeed there was any question. There was no validity to the subrogation agreement signed by the Stricklands. Unless Valley Forge is firmly called to task, it may well continue to ignore the laws of Louisiana and Mississippi designed for the protection of children. It is not sufficient to say that requiring Valley Forge to pay the $55,000.00 again is all that is necessary, that this is protection enough for a particular minor. What about the other minors whose

claims have been or may yet be settled by Valley Forge without a court adjudication that: the settlement is reasonable, fair, and in the best interest of the child, that only a reasonable attorney fee is paid by the minor, and that the funds are the funds of the *minor* for the *minor's damages* and not the funds of the parents. Among the basic responsibilities of parents to a child is that of providing the child with medical care when necessary. This parental obligation exists independent of the cause of the need for medical care; i.e., a parent cannot fail to provide medical care to the child because a third party caused injury to the child. While the third party may ultimately be held liable, the parent cannot wait to provide the medical care. The priority is for the child to receive medical care and for the child to be compensated for her damages. Then, perhaps, it may be appropriate in some cases to consider whether any of the child's money should be used to pay all or part of the parent's debt for the medical care of the child.

Valley Forge initiated this action charged with the knowledge that he who comes into equity must come with clean hands. Asserting a claim contrary to their own policy and contrary to Louisiana law is tainted conduct. Valley Forge points out that Mississippi allows offset regardless of whether the insured's loss may exceed all insurance combined. Louisiana law does not. Had a Louisiana court approved the settlement, that court would have directed any additional steps to be taken to protect further the rights of Tina and could have nipped in the bud the subrogation/offset issue. The Louisiana courts were denied that opportunity by Valley Forge's long-standing practice by which it did not seek court approval. Minors' settlements made beyond the view of the court afford opportunities for the innocent, ignorant and unwritting to be fleeced, hence our historic laws to protect children.

Valley Forge considered Tina's claim worth more than $205,000.00. Valley Forge knew, or should have known,

that the subrogation agreement signed for Valley Forge by the Stricklands was void, or at least subordinate to Tina's being made whole. Valley Forge knew Louisiana law did not permit subrogation or offset until after the insured is made whole. Valley Forge knew there was not sufficient insurance available to make Tina whole. Valley Forge knew it did not obtain court approval of the settlement of Tina's claim. Valley Forge knew Tina was seeking recovery of the $25,000.00 from Aull-Nationwide, and $10,000.00 from Cromwell-Automotive. Armed with all this information, Valley Forge's subrogation/offset contention is without merit and frivolous. Armed with such information, Valley Forge has engaged in a bad faith effort to assert in Mississippi a contention Valley Forge knows it cannot successfully assert in Louisiana, the state where the contract was made. This wilful and wanton conduct, in callous disregard for the rights of a protected group, easily meets the standard for imposition of punitive damages established by our Mississippi Supreme Court. Misconduct such as this compels the conclusion that it is entirely proper, in fact, essential, that the Court apply Mississippi law concerning punitive damages to avoid offending the deeply ingrained and strongly felt public policy of Mississippi to protect minors, and which allows punitive damages to punish a wrongdoer and to deter others from similar transgressions in the future. In assessing punitive damages, the Court considers the net worth of the counterdefendant, Valley Forge. According to its financial statement, that amount, shown as surplus, is $68,561,440.00.

Corporations exist as a result of a privilege granted from the people through the state. This privilege does not include the right to select the laws it will obey. Children are a special class and receive special protection by the laws of all states. Corporations are obliged to respect such laws. Corporate decisions and policies are made by people. The corporation, however, pays when bad decisions and policies are made. It behooves managers, of-

ficers, directors and stockholders to require that corporate decisions not ignore clearly expressed public policy.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the counterclaimant, as mother and next friend of Tina Strickland, be and hereby is awarded judgment of and from the counterdefendant, Valley Forge Insurance Company, in the sum of $55,000.00, representing the full policy limits, plus interest at 8 percent per annum, compounded annually, from the date Nationwide's offer of settlement, being November 29, 1988, until paid.

2. That the plaintiff/counterdefendant Valley Forge is not entitled to subrogation as to the Aull-Nationwide or the Cromell-Automotive policy limits but as between said parties, Tina Strickland is entitled thereto; further that the counterclaimant, as mother and next friend of Tina Strickland, a minor, be and is hereby awarded judgment of and from the counterdefendant for interest in the amount of 8% per annum, compounded annually, on said $25,000.00, from the date of Nationwide's offer of settlement, being November 29, 1988, until paid.

3. That the counterclaimant, as mother and next friend of the minor, Tina Strickland, be and she is hereby awarded judgment of and from the counterdefendant, Valley Forge Insurance Company, for punitive damages in the sum of $2,000,000.00, payable as follows:

   A. $1,000,000.00, payable immediately to Tina Strickland.

   B. $1,000,000.00, payable to Tina Strickland on October 1, 1990, unless prior to that date Valley Forge has done the following:

(1) Adopted a written corporate policy approved on its minutes by its Board of Directors, directing all of its officers, agents and employees to obtain court approval of all of its minors' settlements in Mississippi which are not by law excused from court approval.

(2) Conducted training sessions for all of its officers, agents and employees, educating them as to such minors' settlements policy and applicable Mississippi law, and providing such training to new and future employees.

(4) Filed with this court and with the Insurance Commissioner of Mississippi written evidence that the above-stated requirements have been met and details as to how such was accomplished, including a certified copy of the corporate minutes by which the corporate policy is established, and a statement of how it proposes in the future to continue to carry out such requirements.

(4) Published an ad as hereinafter directed in three consecutive Sunday editions of the following newspapers distributed in Mississippi:

(a) *Clarion-Ledger*, Jackson, Mississippi

(b) Mississippi edition of Memphis *Commercial Appeal*

(c) *Northeast Mississippi Journal*, Tupelo, Mississippi

(d) Meridian *Star*, Meridian, Mississippi

(e) Hattiesburg *American*, Hattieburg, Mississippi

(f) McComb *Enterprise-Journal*, McComb, Mississippi

(g) *Mississippi Sun*, Gulfport, Mississippi

(h) *Mississippi Press*, Pascagoula, Mississippi

(i) Natchez *Democrat*, Natchez, Mississippi,

such ad to read as follows:

"Valley Forge Insurance Company, a member of the CNA group of insurance companies, whose members, as of October 9, 1987, were:

American Casualty Co.

CNA Casualty of California

CNA Lloyds of Texas

Continental Casualty Co.

National Fire Insurance Co.

Transcontinental Insurance Co.

Transportation Insurance Co.

Valley Forge Insurance Co.

has disclosed through sworn testimony of one of its representatives, an employee of CNA Insurance Companies, during the trial of "C.N.A. INSURANCE COMPANY, PLAINTIFF VS. DARLENE STRICKLAND, MOTHER AND NEXT FRIEND OF TINA STRICKLAND, DARLENE STRICKLAND, INDIVIDUALLY, AND VERGIE M. AULL, DEFENDANTS" being Jackson County, Mississippi, Chancery Court Civil Action Number 53,835, Robert H. Oswald, Chancellor, presiding, that it has been the customary practice of C.N.A. companies, not to seek court approval of the settlement of minors' (children's) uninsured/underinsured damages, at least in the states of Mississippi and Louisiana,

A VIOLATION OF LAW
REGARDING CHILDREN

The law of both states requires that the settlement of such damages and matters related to minors and those settlements be approved by a Court of competent jurisdiction.

If you, in the last several years, have had a child who received money damages from one of the C.N.A. companies, or any other insurance company, and you know that it was not approved through a court, then contact:

Honorable Robert Oswald
Chancellor
P. O. Box 998
Pascagoula, Mississippi 39567-0998

PUBLISHED PURSUANT TO JUDGMENT OF THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI, RENDERED JUNE —, 1990."

All proofs of each proposed advertisement must be submitted to this Court for the Court's approval prior to publication. The Court may make such changes as size, design, type style and/or size, as the Court may deem necessary to insure that the purpose of this advertisement is fulfilled. A Proof of Publication shall be submitted to the Court within ten (10) days of the date of last publication to show obedience to this part of this Judgment. Such shall be at least four (4) columns wide by a least twelve (12) inches tall and bounded by, at least, a one-half (½) inch heavy black border enclosing the entire advertisement and using for the printing of the verbiage, 24 point or greater type.

Such ad shall not be printed in the classified ad section, but shall be placed in each of such newspapers in a conspicuous manner designed to attract general public attention.

4. That the counterclaimant shall take all action necessary to establish a tutorship for the estate of Tina Strickland, a minor, and that all sums recovered on behalf of the minor pursuant to this judgment shall be placed in a tutorship account, to be administered by a Louisiana court having jurisdiction over said minor.

5. That the contract of employment between Alvin Denman and Darlene Strickland and T. Patrick Welch, Esq., entitling said attorney, and his co-counsel, to thirty-three and one-third per cent of all sums recovered for the minor, be and hereby is approved.

6. That the counterclaimant, for and on behalf of Tina Strickland, a minor, be and is hereby awarded judgment of and from the counterdefendant for attorneys' fees and expenses in the amount of $30,000.

7. That the counterclaimant be and is hereby awarded costs in this action.

8. That, pursuant to Section 75-17-7 of the Mississippi Code, as amended, interest shall run on this judgment at 8% per annum, compounded annually, beginning June 26, 1990.

SO ORDERED, ADJUDGED AND DECREED, this the 26th day of June, 1990.

/s/ Robert H. Oswald
Chancellor

APPENDIX C

SUPREME COURT OF MISSISSIPPI

LINDA STONE, CLERK
Third Floor Gartin Building
450 High Street
P.O. Box 249
Jackson, Mississippi 39205-0249

July 22, 1993

Dorrance Aultman
AULTMAN TYNER MCNESSE & RUFFIN
P. O. Box 750
Hattiesburg MS 394030750

Theodore A. Boundas
Suite 7300
200 E. Randolph Drive
Chicago IL 606016969

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 22nd Day of July, 1993.

Supreme Court Case #90-CA-0933
Trial Court Case #53835

Valley Forge Insurance Company/
CNA Insurance Company

vs.

Darlene Strickland, Mother and Next Friend
of Tina Strickland, and
Darlene Strickland, Individually

Petition for Rehearing Denied. Prather, P.J. and McRae, J., Not Participating.

Supreme Court Clerk

lwp

ccs: Jim Kitchens
T. Patrick Welch
Jackson County Chancery Clerk